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CITATIONS

726301—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 703

HYMAN RAPPY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 294–298) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 6, 1946 (R. 299). The petition for a writ of certiorari was filed November 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. On direct examination a pre-trial written statement of a government witness was used to refresh his memory as to a single fact related in the statement. On cross-examination the witness was interrogated with respect to substantially all of the other matters of fact asserted in the statement for the purpose of showing that they did not constitute the true recollection of the witness but were adopted under suggestion by and fear of the investigating officers. Thereafter, on motion of the Government, the statement was admitted into evidence. The first question presented is whether it was error to admit the statement.

2. The only other question presented is whether there was sufficient proof of the existence of the property alleged to have been stolen.

STATUTE INVOLVED

The Act of February 13, 1913, as amended, 37 Stat. 670, 43 Stat. 793, 47 Stat. 773, 18 U. S. C. 409, provides in pertinent part:

> Whoever * * * shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, or from any steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate

> or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed or in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels. * * *

STATEMENT

On December 28, 1945 (R. 2), a one-count indictment was returned against petitioner and Charles Essig in the District Court for the Southern District of New York, charging that on or about December 4, 1945, they unlawfully and knowingly had in their possession 1,302 Bulova wrist watch movements which had theretofore been stolen while moving as part of a foreign freight shipment from Le Havre, France, to the United States, the defendants knowing that the movements had been stolen (R. 4). Petitioner was tried alone,[1] found guilty (R. 283, 2), and sentenced to imprisonment for two years and to pay a fine of $5,000. On appeal to the Circuit Court of Appeals for the Second Circuit, his conviction was affirmed (R. 299).

[1] Essig pleaded guilty and was sentenced to two years' imprisonment and fined $5,000 (R. 2).

The evidence in support of the Government's case may be summarized as follows:

The Bulova Watch Company of Switzerland, a wholly owned subsidiary of the domestic Bulova Watch Company, manufactures watch movements in Switzerland which it ships via Le Havre, France, to the parent company in New York (R. 144–145). All of the movements manufactured by the Swiss subsidiary are sent to the parent company for use in assembling Bulova watches (R. 141, 144, 163). Such movements (as distinguished from completed Bulova watches) are never sold in bulk to others, and are only sold in isolated cases, singly or a few at a time, to storekeepers who desire to replace a movement damaged beyond repair (R. 141–142). The procedure in shipping movements is for the Swiss subsidiary to prepare quadruplicate consular invoices—for custom purposes—showing what is contained in each carton shipped and indicating the carton markings and numbers in the same fashion as on the bills of lading (R. 144, 148, 154). Copies of these invoices, together with shipping lists showing in detail the contents of each carton (such as the type of movement and type of dial), are forwarded to Bulova's New York offices (R. 144–145). Thereafter, when specific cartons are embarked at Le Havre and the subsidiary is so advised by its agents there, it, in turn, advises the New York office that a

specific shipment is aboard a specific vessel bound for New York (R. 145). A consular invoice and a shipping list were introduced in evidence showing that on November 10, 1945, seventeen cartons, including two numbered 717 and 725, were shipped on the S. S. *Yaka* from Le Havre, as described above, and that cartons 717 and 725 contained 1,500 and 6,400 movements, respectively, with certain identifying markings (R. 7, 154–156). A clerk of the United States Lines, the carrier, also identified for admission into evidence a bill of lading and a ship's manifest, each of which showed that the aforementioned shipment, including cartons 717 and 725, was received on board the S. S. *Yaka* at Le Havre for unshipping at New York (R. 8–12, 17).[2]

The S. S. *Yaka* arrived at New York on November 19, 1945 (R. 7). A United States customs inspector who checked the cargo removed from that ship at New York (R. 23–24) testified that carton 717 could not be found (R. 27) and that carton 725 (which was introduced as an exhibit at the trial) had been so marked by him on arrival as to indicate that it was full and in good condition at that time, but that thereafter, before being removed from the pier, it was found empty (R. 29–31). This testimony was corroborated by a document called a "delivery record book" which

[2] The testimony of this witness described the preparation and distribution of such documents in the regular course of business of the shipper, the carrier, and the customs service.

the carrier regularly maintains to show what consignments have been delivered to truckers for the consignees (R. 18–19). The balance of the above-described shipment (other than cartons 717 and 725) was received by Bulova, and upon checking it was ascertained that the movements were as described in the consular invoice and shipping list (R. 153–154, 16–17). This was the first time during the entire war period that any such quantity of movements was missing; previously, in a few isolated instances, a small number of movements were missing from cartons but never entire cartons (R. 162–163).

On December 4, 1945, about two weeks after the arrival of the S. S. *Yaka,* petitioner, a New York haberdasher (R. 222), telephoned one Moskowitz, a jeweler who was one of his customers, and asked Moskowitz if he wanted to buy some Bulova watch movements which petitioner said were "hot" (R. 170). Later, on December 12, 1945, after petitioner had been arrested for the offense here, he visited Moskowitz at the latter's place of business and told him about his arrest and asked Moskowitz not to tell the F. B. I., if an agent should inquire, that he had offered Bulova movements to him (R. 172–174).

On December 3 or 4, 1945, petitioner also telephoned Charles Weinstein, another jeweler who was one of his haberdashery customers (R. 46–47), and asked him if he could use some Bulova

watch movements (R. 47). Weinstein said he could not, but that a neighbor might and asked petitioner to call him later (R. 47). Weinstein then made arrangements for petitioner to come to his place of business with samples (R. 47). About 10:30 a. m. on December 4, petitioner, accompanied by Essig, arrived at Weinstein's place of business and Weinstein introduced them to a Mr. Toepfer and a Mr. Moss (R. 48–51, 75).[3] As a result of negotiations that day, petitioner and Essig offered to sell Moss, who, unknown to them, was an F. B. I. agent, approximately 1,300 Bulova movements at $10 a movement (R. 52–57, 77–83). Essig stated that payment could not be by check but must be in cash of bills not larger than $100 denomination (R. 54, 78, 227). During the negotiations, Essig stated that petitioner would get $1 of the $10 for each movement sold (R. 53, 78). Moss testified that in response to his question to Essig, in petitioner's presence, whether the movements were stolen or "hot," Essig replied, "You don't have to worry; they were not stolen in the United States. They were stolen in France" (R. 80). Although the room in which the conversation was held was small and the men stood within five feet of each other (R. 79), petitioner denied hearing anything other

[3] Weinstein testified that petitioner told him at the time that he should not have mentioned his (petitioner's) and Essig's names (R. 51).

than the words, "Don't worry * * * they were not stolen in the United States" and the word "France" (R. 231). At the end of these discussions, agents of the F. B. I. arrested petitioner and Essig and took from them and Moss the 1,302 movements (R. 82–83), which were identified at the trial as being of the same style and type as those missing from the *Yaka* shipment (R. 83, 156–161).

ARGUMENT

1. The principal point urged in the petition for a writ of certiorari is that prejudicial error was committed in admitting into evidence a statement (Gov. Ex. 14, R. 287–288) the witness Moskowitz had previously made to the F. B. I. relating the substance of petitioner's offer to sell Bulova movements to him (Pet. 10–13). On direct examination, after Moskowitz had testified as to the substance of his telephone conversation with petitioner, the prosecutor used this statement to refresh Moskowitz's memory as to the fact that petitioner had referred to the movements as being "hot" (which Moskowitz testified meant "stolen" (R. 170–190)) when he offered them to him. That was the only use made of the statement on direct examination. (R. 169–170.) On cross-examination, defense counsel questioned Moskowitz with respect to most of the other parts of his statement (R. 179, 180–181), and also attempted to draw from him testimony to the effect that the word "hot," attributed by him

to petitioner, had in fact been supplied by the F. B. I. agents in preparing the statement, and that and other damaging portions of the statement had been invented by the agents, who then obtained Moskowitz's signature to the statement through fear of possible consequences to him of non-cooperation (see R. 176–186; R. 195–196, 199–207). Thereafter, the Government offered the statement itself in evidence "on the theory that Mr. Segal [defense counsel] is trying to bring out from this witness that the statement was compounded entirely by Mr. Stokes [an F. B. I. agent], and that that portion of the statement was gratuitously put in there by Mr. Stokes. The statement now becomes in issue and the jury should have an opportunity to look at the statement to see if there are any additions, or any interlineations, or any changes after the witness had signed the statement, and that can only be obvious from the context and set-up of the statement" (R. 197). The statement was then admitted (R. 198). The record shows that some of the statement was in Moskowitz's own handwriting and that there were corrections in the typed portion which had been initialed by the witness (see R. 190–191, 207, 287).

After the jury had deliberated for an hour and twenty-five minutes, they requested that the Moskowitz statement be sent in to them (R. 276, 277, 281, 282). Both counsel said this was "satisfac-

tory" (R. 282). About fifty minutes later the verdict was returned (R. 283).[4]

We think it clear that it was not error to admit the statement in evidence. As petitioner admits (Pet. 11), it is, of course, proper to use such a statement to refresh the recollection of a witness. And while it must be conceded that the statement itself is not, because of the hearsay doctrine, normally admissible in evidence, the peculiar circumstances surrounding the examination of Moskowitz with regard to his statement rendered it admissible. The petition asserts that "The offer by the government could have only one or two objectives, to wit: (1) to support the testimony of Moskowitz, shaken on cross examination; or (2) to bolster the credibility of Moskowitz, shaken by cross examination," and that the statement was admissible for neither purpose (Pet. 12). We may concede that the statement was not admissible for these purposes, but we maintain that it was admissible on the ground advanced by the prosecutor when he offered it (see p. 9, *supra*). By his cross-examination of Moskowitz with respect to other parts of the statement than that referred to on direct, and by his attempt to cast doubt on the authorship of the statement, defense counsel raised a new issue in the case. The purpose and

[4] The petition asserts (p. 12) that the jury requested the statement after three hours of deliberation and implies that the verdict was returned shortly after the statement was given the jury. However, the record shows otherwise, as stated in the text.

intended effect of that cross-examination was to implant in the minds of the jurors the idea that this recordation of Moskowitz's dealings with petitioner was in fact fabricated by the F. B. I. agents and was forced on Moskowitz by fear of the consequences to him of failure to cooperate, and that therefore Moskowitz's recollection was not truly being refreshed by his own prior version of the events. Under such circumstances, it was proper for the Government to establish that in truth the memory of the witness was being refreshed by his own authentic past recorded declarations and not by fabrications foisted on him by others. Obviously, the best evidence available for the jury's resolution of that issue created by the defense was the statement itself, which might—as it in fact did—show that Moskowitz was fully conscious of the contents of the statement when he made it and reviewed, corrected, and signed it as his own. See *Buckley* v. *United States,* 33 F. 2d 713, 717 (C. C. A. 6); cf. *Commonwealth* v. *Jeffs,* 132 Mass. 5; *Smith* v. *Jackson,* 113 Mich. 511, 71 N. W. 843. In such a situation, the prior statement is admitted, not for the purpose of establishing the truth of the matters therein asserted, on which basis it is excludable as hearsay, but merely to establish that it is an authentic and proper document from which the memory of the witness could properly be refreshed. Normally, where the latter issue is not raised, there is no reason to permit the jury to see the statement, but where, as here, the

defense has cast a doubt on the authenticity of the past recordation, as the witness' own statement, it cannot complain of the admission of the recordation itself to determine how that doubt should be resolved.

In any event, it is clear from the record that the admission of the statement was not prejudicial. Indeed, defense counsel stated that sending the statement in to the jury after they had retired was "satisfactory" (*supra*, pp. 9–10). The jury deliberated for almost as long a period of time after it had received the statement as before, so that it cannot fairly be inferred that the statement itself was the pivotal point of the jury's verdict. Moreover, by his cross-examination, petitioner in effect brought out all of the vital portions of the statement over and above that portion properly referred to on direct examination. Obviously, therefore, in terms of the matters therein asserted, since nothing was added by the subsequent introduction of the statement in evidence or its perusal by the jury, its admission could not be said to have been prejudicial. Judicial Code, § 269 (28 U. S. C. 391). Cf. *Bullard* v. *United States*, 245 Fed. 837, 839–840 (C. C. A. 4); *Dean* v. *United States*, 246 Fed. 568 (C. C. A. 5); *Garanflo* v. *United States*, 246 Fed. 910 (C. C. A. 8), certiorari dismissed, 251 U. S. 565; *Gregorat* v. *United States*, 249 Fed. 470, 472 (C. C. A. 5); *United States* v. *Dewinsky*, 41 F. Supp. 149, 155–156 (D. N. J.).

2. Petitioner's second and third points are that there was no proof of the theft of watch movements or of the identity of the movements found at the time of arrest as part of the stolen shipment (Pet. 13–14). As shown in the Statement (*supra,* p. 8), however, there is no question of the adequacy of the proof to show that the movements taken at the time of arrest and identified in evidence were part of the *Yaka* shipment alleged to have been contained in cartons 717 and 725. The only question is whether the movements which the consular invoice, bills of lading, and manifest listed as being in those cartons were in fact placed in and shipped in the cartons. Petitioner argues that the contents of those cartons were never properly proved, as, for example, by the testimony of the persons who packed them, and that therefore the theft itself was never proved. We think the court below gave a fair answer to this contention in adverting to the various shipping documents prepared in the ordinary course of business as establishing at least *prima facie* that the contents of the cartons were as indicated therein. (See R. 295–296.) Moreover, the testimony showed that all of the other cartons in the same shipment in which 717 and 725 were included were received by Bulova in good order and, upon checking, their contents were found to be as described in the shipping documents. In addition, the record shows that Bulova movements were never sold

as such in large quantities and that no large number of movements had been lost previous to the *Yaka* shipment. This evidence was, we submit, sufficient to justify the jury in concluding that cartons 717 and 725 when shipped in fact contained the movements as described in the shipping documents, and that the movements taken on the arrests and identified at the trial were from those cartons. Since there was no evidence in rebuttal to cast doubt on this conclusion, the absence of the testimony of those who packed the cartons was not fatal to proof of the theft as charged.

CONCLUSION

The decision below is clearly correct, and the case does not present any conflict of decisions or question of importance. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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